ously be contended that the legislation would be unconstitutional because it would not have a reasonable tendency to accomplish the purpose aimed at.[19] Enforcement of the law would not be materially contributed to by this provision, which would, upon its face, work unmerited hardship. In short, the matter is one for the sound discretion of the legislature, acting within the bounds of reason. It is at any rate clear that an owner of property who has voluntarily given up possession, or otherwise facilitated the illegal use, has no constitutional protection against a forfeiture.

ACCEPTANCE UNDER PROTEST OF RENT ACCRUING AFTER CAUSE FOR FORFEITURE OF A LEASE. — Where cause for forfeiture of a lease has arisen and the tenant subsequently offers rent accruing after the forfeiture, what should the landlord do to preserve his rights to recover the premises? If he accepts the rent as such, with knowledge of the cause for forfeiture, it is well settled that his very acceptance affirms the continuance of the lease and bars his suit upon the breach.[1] Must he therefore refuse the money altogether, or may he take it on a stipulation that he is receiving it not as rent but as compensation for use and occupation in the interim? The authorities on this point are by no means unanimous. The earlier cases originated in a *dictum* of Lord Mansfield's [2] that the determining factor was the landlord's attitude of mind, and that this was a question of fact for the jury.[3] Each case thus goes on its own merits, and the landlord will preserve his right to recover possession if he makes it sufficiently clear that he does not recognize the tenancy as still existing when he accepts the money. This seems to be law to-day in at least four states,[4] though there is but one case on the exact point.[5] Later English cases inclined to treat the question not as one of fact, but as independent of the subjective intent of the landlord. Thoroughly

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argued that the owner, though guiltless, has voluntarily assumed a risk. The tendency is to draw the line here. For the facts of this case, see RECENT CASES, p. 212, *infra*.

[19] Minnesota *v.* Barber, 136 U. S. 313 (1890).

[1] Pennant's Case, 3 Co. 64a (1596); Conger *v.* Duryee, 90 N. Y. 594 (1882); Ohio Valley Oil Co. *v.* Irvin Co., 184 Ky. 517, 212 S. W. 110 (1919). A suit by the landlord for rent has been held to have the same effect. Dendy *v.* Nicholl, 4 C. B. N. S. 376 (1858). Nasby Bldg. Co. *v.* Walbridge, 6 Oh. App. 104 (1916), *contra*. A mere demand for rent does not bar the landlord's right of re-entry. Blyth *v.* Dennett, 13 C. B. 178 (1853). *Cf.* Camp *v.* Scott, 47 Conn. 366 (1879).

[2] See Doe d. Cheny *v.* Batten, 1 Cowp. 243, 245 (1775).

[3] Goodright d. Charter *v.* Cordwent, 6 T. R. 219 (1795); Prindle *v.* Anderson, 19 Wend. (N. Y.) 391 (1838); Blyth *v.* Dennett, *supra*.

[4] Manice *v.* Millen, 26 Barb. (N. Y.) 41 (1857); Fitzpatrick *v.* Childs, 2 Brewst. (Pa.) 365 (1866); Medinah Temple Co. *v.* Currey, 162 Ill. 441, 44 N. E. 839 (1896). See Doe d. Stedman *v.* McIntosh, 5 Ired. L. (N. C.) 571, 574 (1845).

[5] Fitzpatrick *v.* Childs, *supra*. Certain cases are to be explained on the ground that the money was not for rent that had accrued after the breach, or after the expiration of a notice to quit. Kimball *v.* Rowland, 6 Gray (Mass.) 224 (1856); Miller *v.* Prescott, 163 Mass. 12 (1895); Lindeke *v.* Associates Realty Co., 146 Fed. 630 (1906). *Cf.* also Sixth Avenue Realty Co. *v.* Zeiler & Co., 156 N. Y. Supp. 372 (1916) (express stipulation in lease safeguarding landlord in receiving rent from an assignee); Fleming *v.* Fleming Hotel Co., 69 N. J. E. 715, 61 Atl. 157 (1905) (receiver in temporary possession).

discussed *dicta* in *Croft* v. *Lumley* [6] supported the view that acceptance of rent by the landlord, however much he protested that he did not receive it as rent, operated to bar the landlord's rights under the forfeiture; and in another case [7] where the landlord accepted rent as rent *eo nomine*, but protested that the tenancy was not thereby recognized, the Privy Council held similarly that the landlord's rights were barred. Finally it has been recently held in *Hartell* v. *Blackler* [8] that acceptance of rent accruing after the expiration of a notice to quit (in effect, the same as acceptance after a cause for forfeiture) operates as a withdrawal of the notice to quit, even though the landlord in receiving the money stated that she did not recognize the tenancy as still existing, and said that she retained the money merely "on account of use and occupation of the premises but not as rent." The problem has rarely been before the American courts, but at least one decision and much language in other cases support this view.[9]

The rule of the modern English cases seems to be the more desirable one. The actions of a man are said to speak louder than his words.[10] So in the case of acceptance under protest of a check in payment of a disputed or unliquidated claim, the majority of jurisdictions in this country hold it a good satisfaction in spite of the creditor's statement to the contrary.[11] The courts should prefer if possible an objective standard of interpretation to a subjective standard difficult of ascertainment. The rule is not a severe one on the landlord. After the cause for forfeiture or expiration of the notice to quit, he may proceed at once to recover possession; but if on the other hand he receives rent accruing thereafter, the fair and easily applied rule of law will hold him to the consequences of his receipt, whatever his statements denying them. Only where landlord and tenant both agree that the money is not paid

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[6] 6 H. L. C. 672 (1858). Seven out of eight judges in reporting to the House of Lords held this opinion. Their conclusions were purely hypothetical, and the case went off on another ground. In the Queen's Bench, where the question was necessary to a decision of the case, the same view was also taken; but the intermediate court, like the House of Lords, found it unnecessary to pass on the point. 5 E. & B. 648, 5 E. & B. 682 (1855). See also Griffin *v.* Tompkins, 42 L. T. N. S. 359, 361 (1880); Strong *v.* Stringer, 61 L. T. R. N. S. 470, 472 (1889).

[7] Davenport *v.* The Queen, 3 A. C. 115 (1877); Rex *v.* Paulson, [1920] 3 W. W. R. 372.

[8] [1920] 2 K. B. 161. See RECENT CASES, p. 217, *infra*.

[9] Gulf Railroad Co. *v.* Settegast, 79 Tex. 256, 15 S. W. 228 (1891). See Smith *v.* Edgewood Casino Club, 19 R. I. 629, 630, 35 Atl. 884, 885 (1896); Cochran *v.* Philadelphia Mortgage Co., 70 Neb. 100, 106, 96 N. W. 1051, 1052 (1903); Kenny *v.* Lun, 101 Minn. 253, 257, 112 N. W. 220, 221 (1907). *Contra*, Prindle *v.* Anderson, 19 Wend. (N. Y.) 391, 394 (1838); Sternburger *v.* Eiler, cited 2 Brewst. (Pa.) 365, 369 (1867). See KALES, ESTATES, FUTURE INTERESTS, 2 ed., 290, predicting that Illinois will follow the majority view, — a prediction which seems hardly to be borne out by Mednah Temple Co. *v.* Currey, *supra*. See also 1 TIFFANY, REAL PROPERTY, 2 ed., 302; 2 TAYLOR, LANDLORD AND TENANT, 9 ed., 74 note.

[10] See Croft *v.* Lumley, *supra*, 694, 722, 734.

[11] Beck Electric Co. *v.* National Contracting Co., 143 Minn. 190, 173 N. W. 413 (1919); Triangle Conduit Co. *v.* Klorman, 181 N. Y. Supp. 366 (1920). See Samuel Williston, "Accord and Satisfaction," 17 HARV. L. REV. 459. The rule is otherwise in England. Day *v.* McLea, 22 Q. B. D. 610 (1889). See Hartell *v.* Blackler, *supra*, for a discussion on this apparent inconsistency with the English rule as to landlord and tenant.

as rent but as temporary compensation, may it be conceded that the general principle does not apply.[12]

The right of election in the landlord prevents the rule from operating harshly. The situation is often described by the courts in terms of "waiver";[13] but "election" is a better term in that it emphasizes the landlord's right to choose between two courses of action.[14] If therefore by some statute he is deprived of his voluntary choice in the matter, and is compelled to receive rent after the cause for forfeiture, his right of action on that forfeiture should not be barred. So in the recent case of *Evans* v. *Enever*,[15] where a tenant was allowed by statute to stop a suit for possession for failure to pay rent by paying up back rent, it was held that the landlord in thus taking the rent would not be barred from suing on other prior breaches; and the American authority is in accord with this view.[16]

In neither case is the rule unfair to the landlord. Where he is free to elect, his acceptance is final: where he is compelled to accept, his rights are not barred.

CAN AN ADMISSION BY SILENCE WHILE UNDER ARREST BE USED AS SUPPORTING EVIDENCE? — It is well settled that if one fails to contradict a damaging statement made in his presence, under such circumstances that, hearing and understanding, he would naturally deny the statement if untrue, he is taken to adopt the statement as his own.[1] This is usually held to apply even if the statement is a charge of crime on suspicion of which the person is then under arrest;[2] and such adopted statements are admissible at the criminal trial as statements of the de-

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[12] Holman *v.* Knox, 25 Ont. L. Rep. 588 (1911).

[13] See Kenny *v.* Lun, *supra*, 256.

[14] See EWART, WAIVER DISTRIBUTED, 7, for an apt criticism of the loose use of "waiver."

[15] [1920] 2 K. B. 315. See RECENT CASES, p. 217, *infra*. See also Toleman *v.* Portbury, L. R. 6. Q. B. 245 (1871), L. R. 7 Q. B. 344 (1872), a case under the same statute as Evans *v.* Enever, *supra*, where on the landlord's refusal to receive the money at all it was paid into court.

[16] Palmer *v.* City Livery Co., 98 Wis. 33, 73 N. W. 559 (1897); Granite Bldg. Corp'n *v.* Greene, 25 R. I. 586, 57 Atl. 649 (1904). It is also possible to support these cases on the theory that a suit for possession is an election of such binding nature that acceptance of rent thereafter has no effect upon that election. Doe d. Cheny *v.* Batten, *supra*; Doe d. Morecraft *v.* Meux, 1 C. & P. 346 (1824); Doe d. Stedman *v.* McIntosh, *supra*; Importers Co. *v.* Christie, 5 Robt. (N. Y.) 169 (1867). See Cleve *v.* Mazzoni, 19 Ky. L. Rep. 2001, 2002, 45 S. W. 88, 89 (1898). *Contra*, Gomber *v.* Hackett, 6 Wis. 323 (1857); Guptill *v.* Macon Stone Co., 140 Ga. 696, 79 S. E. 854 (1913). See 1 TIFFANY, REAL PROPERTY, 2 ed., 302, 303. *Cf.* Barber *v.* Stone, 104 Mich. 90, 62 N. W. 139 (1895); Marshall *v.* Davis, 28 Ky. L. Rep. 1327, 91 S. W. 714 (1906).

[1] Rex *v.* Smithies, 5 C. & P. 332 (1832); Donnelly *v.* State, 26 N. J. L. 601 (1857). See 1 GREENLEAF, EVIDENCE, 16 ed., §§ 197–198.

[2] Kelley *v.* People, 55 N. Y. 565 (1874); State *v.* Sudduth, 74 S. C. 498, 54 S. E. 1013 (1906). *Contra*, State *v.* Diskin, 34 La. Ann. 919, 44 Am. Rep. 448 (1882); Commonwealth *v.* Kenney, 12 Metc. (Mass.) 235, 46 Am. Dec. 672 (1847); but see Commonwealth *v.* Spiropoulas, 208 Mass. 71, 94 N. E. 451 (1911), where "Me no talk. I want to see my lawyer," was held not silence nor denial and therefore an adoption of the statement.